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IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

In our opening brief, we explained that the FCC's conclusion in the order under review — that cable operators providing cable modem service do not provide a separate "telecommunications service" — is fully consistent with the Communications Act and is not otherwise unlawful. In their briefs, respondents argue that the FCC's view violates the Communications Act, is contrary to the administrative *Computer II* regime, and constitutes poor policy. As more fully explained below, however, respondents' views find support in neither statutory definitions nor *Computer II*, and respondents' policy views are contrary to those of the FCC — the agency to which Congress delegated cable modem service's classification.

In particular, respondents overlook that the statutory definition of "telecommunications service" is entirely consistent with pre-1996 common-carrier law, capturing firms insofar as they (whether voluntarily or by compulsion) offer "telecommunications," while not capturing firms insofar as they offer "information service" (computer functionality provided via telecommunications). As the FCC reasonably determined, cable operators providing cable modem service fall on the "information service" side of the line: they have not chosen to offer "telecommunications" and have not been compelled to do so.

Respondents are wrong in reading the definition of "telecommunications service" as overturning the FCC's view that information service providers should be free from common-carrier regulation — a decades-old policy that has served the Nation well. All the evidence (in the statutory text, the legislative history, and the 1996 Act's overall deregulatory purpose) points to the conclusion that Congress did not intend to break with prior practice.

And, if there were any doubt on that point, the FCC's view would still be entitled to deference.

I. RESPONDENTS' STATUTORY ARGUMENT IS UNCONVINCING.

A. An Information Service's "Telecommunications" Component Does Not Imply a "Telecommunications Service."

Respondents' argument based on statutory language runs as follows: (1) cable operators offer cable modem service "for a fee directly to the public"; (2) cable modem service is an "information service" and thus by definition provided "via telecommunications"; and (3) therefore, cable operators "offe[r] . . . telecommunications for a fee directly to the public."[1] But respondents' conclusion does not follow from their premises.

The statute defines "telecommunications service" as involving an "offering of telecommunications for a fee directly to the public." The statute recognizes "information service" as a service distinct from "telecommunications service," and defines it as having a "telecommunications" input. In the ordinary meaning of "offer," a firm offering a finished product is not making a separate offer of each individual ingredient. Thus, the definition of "telecommunications service" does not compel the conclusion that, when "information service" is being offered, the "telecommunications" ingredient is also being offered for a fee directly to the public.[2]

[1] *See, e.g.*, Earthlink at 18; MCI at 16.

[2] *See* NCTA Opening Br. 21 & n.26.

B. Respondents' View Would Turn Most Information Service Providers into Common Carriers.

Respondents' view of the statute not only is wrong on its own terms but also attributes to Congress an unlikely intent: to make common carriers out of almost all information service providers. Almost all information service providers incorporate some "telecommunications" in their services. For example, even dial-up Internet Service Providers ("ISPs") transport information — often over massive distances — from a local point of presence to remote networks and computers.[3] Yet, the FCC has always refused to regulate information service providers as common carriers.[4] It is inconceivable that Congress meant to overturn that decades-old deregulatory policy through a deregulatory statute's ambiguous definitions. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[5]

Nonetheless, respondents say that this is precisely what Congress did: they posit that, after the 1996 Act, all information service providers incorporating telecommunica-

[3] *See, e.g.*, http://computer.howstuffworks.com/internet-infrastructure1.htm. Insofar as respondents equate dial-up ISPs with pure content providers, *see, e.g.*, CPUC at 16 (equating ISPs with Expedia), they are wrong.

[4] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 69 (1998) ("*Report to Congress*"). CPUC (at 15-16) argues that "last mile" facilities (facilities carrying traffic from the subscriber's premises to an ISP's local point of presence) should be treated differently, but that distinction has no basis in the statutory text.

[5] *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see Jones v. United States*, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so.").

tions into their service become common carriers.[6] Earthlink tries to escape that result by arguing that the FCC exercised "forbearance" decades ago. Before 1996, however, the FCC did not have forbearance authority.[7] Regardless, if — as Earthlink says — the 1996 Act's definition of "telecommunications service" changed the law, it is illogical to suggest that the FCC could neutralize that change in advance.

C. Respondents Are Wrong in Arguing That the FCC's Reasoning Allows Avoidance of Title II.

Unable to explain away the absurd consequences resulting from their own reading, respondents nonetheless accuse the FCC's reading of producing absurd results.[8] According to respondents, the FCC's decision will allow any firm to avoid Title II regulation merely by adding computer functionality to telecommunications.[9]

1. Respondents' suggestion that it is strange that common-carrier status should depend on a firm's own choices ignores Title II's basic plan. Insofar as here relevant, Title II imposes duties only on "common carriers."[10] There are two ways in which a firm can become a common carrier: (1) by voluntary practice (*i.e.*, by holding itself out as providing telecommunications for a fee directly to all comers); or (2) by compulsion (*i.e.*, where the FCC determines that the firm should be required to hold itself out as a common carrier because the firm has market power).[11] It is black-letter law that, without more, firms that decline to hold themselves out as common carriers are *not* subject to common-carrier duties.[12]

Far from being unusual, the FCC's decision under review is fully in keeping with that principle. As the FCC correctly determined, a cable operator relying on its own telecommunications facilities provides "telecommunications" only to its own affiliated ISP.[13] The FCC has further recognized that, when a cable operator provides access to one or more unaffiliated ISPs, it may be providing them with "telecommunications" but, unless it holds itself out to all ISPs indiscriminately, is only a private carrier.[14] It would make no sense to treat a cable operator doing

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[6] *See* Earthlink at 45; MCI at 30.

[7] *See* CPUC at 32 ("Congress in § 160 gave the FCC a powerful new deregulatory tool of forbearance, which the agency previously lacked."); *see also MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) ("[T]he Commission's estimations . . . of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate regulation, filed tariff system for common carrier communications . . . ."); *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Ginsburg, J.) (rejecting notion that FCC had "general authority to forbear from full Title II common carrier regulation").

[8] Earthlink at 21.

[9] *Id.* at 21; MCI at 22; CPUC at 21.

[10] *See* CPUC at 33 ("much of Title II applies only to . . . 'common carriers'"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994) ("only common carrier activity falls within the Commission's regulatory power under Title II").

[11] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (firms are common carriers where they actually "hold themselves out to serve indifferently" or where they are under "legal compulsion thus to serve indifferently"); *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, ¶ 9 (1998) ("the focus of our inquiry [under the compulsion prong] is whether the [firm] has sufficient market power to warrant regulatory treatment as a common carrier").

[12] *See, e.g., Southwestern Bell*, 19 F.3d at 1481.

[13] *See Report to Congress* ¶ 69 n.138; Pet. App. 98a (¶ 41).

[14] *See* Pet. App. 112a-114a (¶ 55).

business with multiple ISPs as a private carrier while treating a cable operator doing business with only its own affiliated ISP as a common carrier.

2. Respondents' suggestion that the decision under review will make Title II easy to avoid is likewise wrong. Insofar as firms already provide services on a common-carrier basis, they cannot stop providing them unless the FCC grants permission to that effect.[15] As for new services, the FCC's decision that one particular service is an information service does not impair the FCC's ability to classify other services on a case-by-case basis. When it does so, it will find that many services do not lend themselves to adding the amount of computer functionality necessary for information-service status.[16] And, finally, the FCC can in many cases exercise its power to turn a non-common-carrier service provided by a firm with market power into a common-carrier service.

3. Respondents are also wrong in suggesting that it is irrational to have a rule under which a component that might be regulated when offered alone is not regulated when it is part of a service that has additional functionality. To the contrary, the FCC's refusal to regulate the "telecommunications" component of an "information service" bundle has a sound basis in policy. In *Computer II*, the FCC determined that information services should be unregulated. It further found that regulating the communications component of enhanced services threatened regulatory creep: "an indirect forcing of currently unregulated

[15] *See* 47 U.S.C. § 214(a).

[16] *See, e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket No. 03-133, FCC 05-41, ¶¶ 14-21 (rel. Feb. 23, 2005) (rejecting attempt to turn long-distance telephone service into information service).

entities to acquire common carrier status in order to obtain the same degree of flexibility afforded a resale common carrier."[17] That policy basis is entirely sensible.

4. Respondents' fall-back position is that the communications and computer functionality of cable modem service are not truly intertwined. In particular, respondents make much of subscribers' ability to "click-through" to third-party web pages.[18] Respondents' argument (which can be made with equal force about all ISPs, including Earthlink) starts from a legally flawed premise. Because "information service" is defined as "the offering of a *capability* for" data manipulation, whether every communication involves data manipulation is irrelevant.[19] And, even if functionality not involving data-manipulation "capability" could be isolated, it would not matter so long as that functionality were offered as an integrated bundle with computer functionality.[20] Besides, respondents' "click-through" argument rests on a mistaken factual basis. Click-through almost always involves "caching"[21] and

[17] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 112 (1980) ("*Computer II*").

[18] *See* Earthlink at 16; MCI at 25; CPUC at 10, 20 n.7, 22.

[19] *See* Pet. App. 95a (¶ 38) ("Internet access service . . . is an information service . . . regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting").

[20] *See id.* 94a-95a (¶ 38) ("[C]able modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.").

[21] *See id.* 66a-67a (¶ 17 & n.76).

access to the "DNS,"[22] each of which involves computer functionality.

D. Earthlink's Attempts at Sowing Statutory Confusion Are Unconvincing.

1. The Government's opening brief pointed out that "information service" is defined in such a way as involving a change in the content of transmitted information. In contrast, "telecommunications service" is defined (indirectly, through the definition of "telecommunications") as involving transmission of information "without change." Thus, the statute suggests that a single service cannot simultaneously be an "information service" (involving change) and a "telecommunications service" (involving no change). But Earthlink (at 37-38) suggests that this view is self-defeating: if there is no "telecommunications," it says, there can be no "information service," which is defined as offered "via telecommunications."

Earthlink ignores that the question here is not whether the statute encourages (or even compels) the FCC's policy decision to leave information services unregulated but whether the statute *prohibits* it. Besides, the FCC's view — far from being self-defeating — is correct. Contrary to Earthlink's argument, the FCC's reasoning does not imply that there is no "telecommunications." Rather, it reflects the simple logic that combining functionality involving no change with functionality involving change results in a service involving change.

2. Earthlink attempts to sow additional confusion by pointing to the FCC's statement that cable operators are "merely using telecommunications to provide end users with cable modem service."[23] Earthlink says that this is at

[22] *See id.* at 66a (¶ 17 & n.74), 92a (¶ 37), 95a (¶ 38 n.153).

[23] *Id.* 98a (¶ 41).

odds with the definition of "telecommunications" as transmission of information "of the user's choosing": according to Earthlink, "[t]he user in this context — *i.e.*, the party that selects the information transmitted — is the subscriber, and not the cable company."[24]

This argument is a play on the word "use." When the FCC stated that cable operators are "using telecommunications to provide end users with cable modem service," it meant that, to produce an "information service," cable operators incorporate "telecommunications" as an input. The agency did not identify the "user" for purposes of Section 3(43). Even if Earthlink were right that the Section 3(43) "user" is the subscriber, that would not be inconsistent with the FCC's view that the ISP "uses" telecommunications in the sense of employing it as an input. Similarly, it would not mean that the subscriber receives an "offering of telecommunications" — just as there is no such "offering" when Earthlink buys DSL transport from a telephone company and combines it with computer functionality to create a retail ISP service.

II. RESPONDENTS' RELIANCE ON *COMPUTER II* IS MISPLACED.

A. Respondents Overlook That *Computer II* Imposes Duties Only on Common Carriers.

As we explained in our opening brief (at 26-27), *Computer II* — insofar as relevant here — stands for two distinct principles. *First*, providers of "enhanced services" were left unregulated: even though many enhanced service providers use communications functionality that they incorporate into their service, they were not subjected to common-carrier regulation.[25] In particular, enhanced ser-

[24] Earthlink at 39.

[25] *See Computer II* ¶¶ 114-123.

vice providers were not required to separate their enhanced services into separate computer and communications components.[26]

Second, "common carriers" were permitted to offer information services only subject to certain safeguards. For major carriers, this included a separate-subsidiary requirement that, in practice, meant unbundling. "Other common carriers" — including long-distance entrants like MCI and Sprint — were subject to a lesser requirement, set forth in Paragraph 231: "those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized."[27]

Whatever Paragraph 231 requires, it applies only to "common carriers" — not, as respondents would have it, to any "owner of a telecommunications facility."[28] Cable operators have never been viewed as common carriers.[29] To the contrary, cable operators were listed in *Computer II* itself as an example of the black-letter principle that "all those who provide some form of transmission services are not necessarily common carriers."[30] And cable operators did not become common carriers when they began providing cable modem service: in *Computer II*, the FCC expressly rejected the notion that the communica-

[26] *See id.* ¶¶ 102-113.

[27] *Id.* ¶ 231.

[28] Earthlink at 24; *see also id.* at 45 ("facilities-based . . . providers of information services"); MCI at 32, 38 ("owners of transmission networks").

[29] *See* NCTA Opening Br. at 28 n.53.

[30] *Computer II* ¶ 122.

tions component in an enhanced service turns its provider into a common carrier.[31]

Thus, properly understood, *Computer II* does not help respondents — it forecloses their position. And, if there were any doubt about that, the FCC's interpretation of its own policy would be entitled to the most robust form of deference.[32]

B. Respondents Are Wrong in Arguing That the Decision Below Is Inconsistent with Post-*Computer II* Precedent.

Respondents claim that the order under review is inconsistent with an order in which the FCC held that, when local telephone companies provide broadband Internet service (so-called DSL), they must provide the telecommunications component separately to rival ISPs.[33] But these companies unquestionably are "common carriers," and thus unquestionably are subject to the requirements of the *Computer Inquiries*. And, insofar as the FCC required unbundling of DSL, it did so pursuant to the requirements applicable only to incumbent LECs — not (as respondents imply) pursuant to *Computer II* ¶ 231.

Respondents are also wrong in relying on precedent rejecting common carriers' attempts at avoidance. In the cases on which respondents rely, common carriers argued that, when they combined telecommunications with computer functionality, the result was an information service

[31] *See id.*

[32] NCTA Opening Br. at 28 & n.52.

[33] *See* Earthlink at 25-26 (relying on *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 36 (1998)); *see also* MCI at 35; CPUC at 23.

free from common-carrier regulation.[34] This precedent simply stands for the proposition that, when a carrier is subject to a duty to offer a particular service on a common-carrier basis, that duty does not disappear when computer functionality is added.[35] It does not address the question here: whether a particular service is provided on a common-carrier basis in the first place.

For the same reason, Earthlink's reliance on "MFJ" precedent misses the point.[36] Under the MFJ, Bell companies were prohibited from providing "interexchange telecommunications services," but, after 1987, were allowed to provide certain "information services." Bell companies relied on that fact by arguing that, when they bundled long-distance service with computer functionality, the combination became an information service, which they were allowed to provide. Not surprisingly, the D.C. Circuit held that, just as adding computer functionality cannot make an underlying common-carrier duty disappear, it cannot dispel an underlying prohibition.[37]

C. Attempts To Bring Cable Operators Within *Computer II*'s Scope Are Unconvincing.

Respondents next argue that some cable operators *are* common carriers: they argue that a few cable operators

[34] *See, e.g.*, Earthlink at 24 (citing *Independent Data Manufacturer's Association, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (CCB 1995)).

[35] *See, e.g., Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of [computer functionality] to a basic service neither changes the nature of the underlying basic service *when offered by a common carrier* nor alters *the carrier's* tariffing obligations").

[36] Earthlink at 24-25 (citing *United States v. Western Elec. Co.*, 907 F.2d 160 (D.C. Cir. 1990)).

[37] *See Western Elec.*, 907 F.2d at 163.

have been providing traditional circuit-switched telephone service, which — they say — qualifies them as common carriers.[38] But *Computer II* imposed obligations on firms that were "common carriers" in the sense that they had previously held themselves out as offering the telecommunications via which information services could be provided.[39] The cable operators to which respondents point have never done so. The FCC's refusal to extend *Computer II* to such cable operators is in keeping with the settled principle that a firm can be a common carrier for one purpose but not for another.[40] Besides, the FCC held that, if *Computer II* could be read to impose any requirements on such cable operators, those requirements should be waived.[41] Respondents' briefs do not challenge that waiver.

D. Respondents' Codification Argument Is Unconvincing.

Respondents also argue that, by passing the 1996 Act, Congress codified *Computer II*. Any codification argument is implausible: it is not reasonable to conclude from Congress's borrowing of a few definitions that it intended

[38] *See* Earthlink at 41 n.11; MCI at 26; CPUC at 44.

[39] *See, e.g., Computer II* ¶ 5 ("basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications").

[40] *See, e.g., Southwestern Bell*, 19 F.3d at 1481 ("The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [other forms] on a common carrier basis.").

[41] *See* Pet. App. 102a (¶ 45).

to codify a complex body of substantive rules.[42] More importantly, respondents' argument cannot improve their position: if they lose under *Computer II*, they doubly lose under a codified *Computer II*.

Respondents' apparent answer is that, in the course of being codified, *Computer II* changed meaning — supposedly because Congress added to the definition of "telecommunications service" the words "regardless of the facilities used." Those words, respondents imply, mean that Congress meant to expand the unbundling requirements that *Computer II* imposed on common carriers to apply to all owners of telecommunications facilities.

Nothing in the words on which respondents rely supports their view. Those words imply nothing more than that, when a service is captured by the definition of "telecommunications service," it cannot escape on the ground that it is provided over a particular set of facilities. The FCC's decision in the order under review — that a provider of an "information service" does not provide a "telecommunications service" unless it provides "telecommunications" separately — applies to all facilities equally, and therefore is congruent with the statutory text. If Congress had wanted to make the radical departure respondents suggest, it would have done so explicitly.

Respondents' position is particularly untenable because they do not point to any debate concerning the massive expansion of *Computer II*'s unbundling duties that they

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[42] *Cf., e.g., Hannon v. United States*, 48 Fed. Cl. 15, 23 (Fed. Cl. 2000) ("The explicit incorporation by Congress of the retirement statutes' definition of a 'law enforcement officer' into FLEPRA is not a sufficient basis for reading into FLEPRA a requirement that the retirement statutes' review mechanisms through the MSPB must be utilized when reviewing pay issues."); *Crowley v. United States*, 398 F.3d 1329, 1334-35 (Fed. Cir. 2005) (same).

propose. Nor can respondents explain why the legislative history manifests a contrary intent: a sentence that might lend support for their view was removed from the Senate bill.[43] The FCC, when reviewing this and other evidence concerning the interplay between *Computer II* and the 1996 Act (incidentally, at the invitation of Congress itself), concluded in 1998 that Congress did not intend to effect the sea change that respondents are seeking.[44] In the years since then, Congress has not seen fit to change the law — a fact making it even less plausible that the FCC misread Congress's intent.

III. RESPONDENTS' OTHER ARGUMENTS ARE UNCONVINCING.

Finally, respondents present a grab-bag of other arguments, none of which is persuasive.

A. Respondents' Remaining Statutory Arguments Are Unconvincing.

1. Respondents continue to rely on Section 10 as somehow suggesting that cable modem service must contain a "telecommunications service."[45] As explained in our opening brief, however, Section 10 grants the FCC authority to refrain from applying common-carrier regula-

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[43] S. Rep. No. 104-23, at 79 (1995) ("The term includes the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services."); *see also* NCTA Opening Br. at 24.

[44] *See Report to Congress* ¶ 45 ("[A] decision by Congress to overturn *Computer II*, and subject [information] services to regulatory constraints . . . would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so.").

[45] *See* Earthlink at 42-43; CPUC at 32.

tion to particular common carriers in particular circumstances. The FCC had sought that power after entry by MCI and Sprint had focused attention on the problem that Title II's terms impose duties on all common carriers, even when it makes little sense to regulate common carriers lacking market power. Section 10 does not and could not logically imply that all firms (in the communications industry? in the economy at large?) are common carriers.

Nor is it persuasive for respondents to suggest that, given the forbearance safety valve, a common-carrier classification is not onerous. Section 10 allows the FCC to forbear only after conducting burdensome administrative proceedings. While those proceedings are pending, common-carrier duties remain in effect. Any forbearance order can be appealed. Just how difficult it can be for the FCC to forbear became clear when the FCC attempted to use its forbearance authority to deregulate the long-distance industry: interested parties managed to block deregulation for a full five years,[46] which no doubt meant billions of dollars to those who stood to profit from it.

2. Earthlink next argues that the last segment of the statutory definition of "telecommunications carrier" — "the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage"[47] — implies that cable modem service must contain a common-carrier service. Earthlink attempts to support its argument with a suggestion that cable modem service was offered well before 1996, which, it implies,

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[46] *See* News Release, *Detariffing of Long Distance Telephone Industry To Become Effective at the End of the Month* (rel. July 25, 2001) (available at http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0130.html).

[47] 47 U.S.C. § 153(44).

means that Congress must have been aware of the controversy concerning cable modem service's classification.[48]

This argument is unavailing. The purpose of the satellite clause was merely to clarify that one particular issue was for the Commission to resolve. It could not mean that all other firms are common carriers. Besides, at the time of the passage of the 1996 Act (February 1996), cable modem service was in its infancy,[49] making it unlikely that Congress would have identified a possible future classification issue. Earthlink's mistaken suggestion that cable modem service was being provided well before 1996 is based on a citation to a part of this Court's *Gulf Power* opinion that described a different data-related service.

3. Finally, respondents rely on the segment of Section 3(44) that provides that a telecommunications carrier "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[50] According to respondents, this language reflects "Congress' understanding that services might be marketed together without altering their individ-

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[48] Earthlink at 34 n.10.

[49] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 47 (1998) (reporting that "as of October 1997," there were only "about 50,000 cable modem subscribers"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, ¶ 108 (Jan. 2, 1997) ("a number of cable system operators recently announced large orders for cable modems, and the near-term deployment of Internet access services was one of the most discussed topics at a recent industry trade show"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, ¶ 127 (Dec. 11, 1995) ("[c]able access to the Internet currently is being tested").

[50] CPUC at 20; *see also* Earthlink at 39.

ual legal statuses."[51] In fact, the statutory language merely codified the established principle that, when a firm offers one service on a common-carrier basis, common-carrier regulation does not automatically become applicable to the firm's other services if they are not so offered.[52] Respondents have that principle exactly backward.

B. Respondents' Policy Arguments Are Unconvincing.

Respondents argue that the FCC's decision is wrong as a matter of policy — on the theory that, if cable operators are common carriers, they will be required to afford "access" to ISPs like Earthlink, and that this will benefit consumers.[53] The short answer is that, "regardless of their persuasiveness, the sort of policy arguments forwarded by [respondents] are properly addressed to the Commission or to the Congress, not to this Court."[54]

In any event, respondents' suggestion that requiring "access" will automatically increase consumer welfare by enhancing consumer choice is incomplete. All sharing obligations come with a drawback: there is no "guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."[55] For that reason, the D.C. Circuit has held that the Communica-

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[51] CPUC at 20.

[52] *See supra*, p.13 n.40.

[53] It seems at best uncertain whether "access" obligations would in fact result from respondents' theories, but there is no need to discuss that here: respondents' policy arguments are meritless regardless.

[54] *New York v. FERC*, 535 U.S. 1, 24 (2002).

[55] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part).

tions Act does not allow the FCC to impose access obligations unless there are particularly strong reasons to believe that they will make consumers better off.[56] Such a justification does not exist when cable operators are subject to robust competition from other providers of broadband Internet service, with additional competitors on the way.[57]

C. Respondents' Remaining Allegations of Arbitrariness Are Unconvincing.

Earthlink suggests that the order under review is inconsistent with the FCC's implementation of the so-called "CALEA" statute.[58] Earthlink is wrong. CALEA imposes duties to help law enforcement on "telecommunications carriers," but exempts providers of "information services."[59] Although "information service" is defined in a way similar to the definition of that term in the Communications Act,[60] CALEA defines "telecommunications carrier" differently: even if a firm is not a "telecommunications carrier" for purposes of the Communications Act, CALEA authorizes the FCC to "deem" the firm to be a "telecommunications carrier" for purposes of CALEA.[61] In a recent notice of proposed rulemaking, the FCC tentatively decided that it should exercise this "deeming" power with respect to cable modem service.[62] The FCC

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[56] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

[57] *See* NCTA Opening Br. at 4-5.

[58] Earthlink 48-49.

[59] 47 U.S.C. § 1002(a), (b)(2)(A).

[60] *Id.* § 1001(6)(A).

[61] *Id.* § 1001(8)(B)(ii).

[62] *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 15676, ¶ 47 (2004).

further interpreted CALEA to say that, when it exercises its "deeming" power, it not only places a firm inside the "telecommunications carrier" category but also removes it from the "information service" provider category.[63] Because this is based on a provision that has no analogue in the Communications Act, there is no inconsistency.

Finally, Earthlink argues that the FCC "ignore[d]" the views of the Ninth Circuit in the *City of Portland* decision, which Earthlink wrongly persists in claiming to have been based on the statute's plain language.[64] In fact, the FCC devoted three paragraphs to explaining why *Portland* was unpersuasive.[65] It pointed out that the Ninth Circuit had ignored that "under the Act telecommunications is distinct from telecommunications service," and that, "[t]hough by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber."[66] Nothing more was required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[63] *See id.* ¶ 50.

[64] Earthlink at 8, 50; *accord* CPUC at 17.

[65] *See* Pet. App. 114a-116a (¶¶ 56-58).

[66] *Id.* at 116a (¶ 59).

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